The Case of Petronia Iusta*

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* The following sources are cited in an abbreviated form below : V. ARANGIO-RUIZ, *Il processo di Giusta*, *Par. Pass*. 3 (1948), 129-151 ; M. KASER, *Das römische Privatrecht*, 2nd ed. rev. K. HACKL, Munich 1996 ; O. LENEL, *Das edictum perpetuum*[3], Leipzig 1927 ; E. METZGER, *The current view of the extra-judicial uadimonium*, *ZSS* (rom. Abt.) 117 (2000), 133-178 ; E. METZGER, *Interrupting proceedings in iure: uadimonium and intertium*, *ZPE* 120 (1998), 215-225.

The following abbreviations are used: RS I, II = M.H. CRAWFORD (ed.), *Roman Statutes* (Bulletin of the Institute of Classical Studies, suppl. 64) London 1996, 2 vols ; TH = Tabula(e) Herculanensis(es).

Citations to the Herculaneum tablets below are to these sources : G. PUGLIESE CARRATELLI, *Tabulae Herculanenses* I, *Par. Pass*. 1 (1946), 379-385 (*editio princeps*) ; G. PUGLIESE CARRATELLI, *Tabulae Herculanenses* II, *Par. Pass*. 3 (1948), 165-184 (*editio princeps*) ; V. ARANGIO-RUIZ, *Tavolette ercolanesi (il processo di Giusta)*, *BIDR* (3rd series) 1 (1959), 223-245 ; L. BOVE (ed.), *Studi epigrafici e papirologici*, Naples 1974. <152>

Introduction

Petronia Iusta was a young woman who lived in Herculaneum in the seventies AD, and who was the subject of a lawsuit in Rome. The Iusta lawsuit is known to us through legal documents preserved on wax tablets and discovered in Herculaneum in the 1930's. The lawsuit is not mentioned in literary sources and thus the only evidence for the lawsuit is the words of the documents themselves. In some respects the evidence is very generous: the collection is large, comprising eighteen documents, and among these documents are several well-preserved *vadimonia* and *testimonia*. Also, the documents make plain that one of the principal issues in the suit is Iusta's *ingenuitas*. Unfortunately, our information beyond this is limited. Many of the most important facts are not settled: who was suing whom, why the suit was brought, how <152> the suit was resolved. This is unfortunate, because this lawsuit has for a long time been a subject of great interest to those who study the law of persons (particularly Junian Latins and patronal rights[1]), as well as those with an interest in process.[2]

We do not have a secure chronology for the documents, and this has hindered our understanding of the lawsuit. Most of the documents are undated and do not otherwise suggest in any obvious way how they should be ordered. It is therefore not possible to suggest exactly how the documents should be ordered without at the same time adopting a comprehensive explanation of the lawsuit, something which requires a great deal of gap-filling. Some observations on the proper order for these documents is nevertheless possible without adopting any particular explanation. We can, for example, reject certain chronologies as impossible or unlikely. Most explanations of this lawsuit thus far, in fact, have adopted the chronology of the earliest editors, a chronology which is open to improvement. This is the subject of the discussion below. It is hoped that a better chronology will improve the chances of understanding the lawsuit.

[1] J. CROOK, *Law and Life of Rome* New York-London 1967, 48-50 ; B. RAWSON, *Children in the Roman Familia*, in B. RAWSON (ed.), *The Family in Ancient Rome. New Perspectives*, London 1986, 170-200 ; J.F. GARDNER, *Women in Roman Law and Society*, London 1986, 224s. ; P.R.C. WEAVER, *Children of Freedmen (and Freedwomen)*, in B. RAWSON (ed.), *Marriage, Divorce, and Children in Ancient Rome* Oxford 1991, 166-169.

[2] F. COSTABILE, *Nuove luci sul "processo di Giusta"*, in *Studi in onore di Cesare Sanfilippo* 7, Milan 1987, 185-230 ; J.F. GARDNER, *Proofs of Status in the Roman World*, in *Bulletin of the Institute of Classical Studies* 33 (1986), 1-14 ; A. PIGANIOL, *Observations sur le procès de Justa*, in *Studi in onore di Ugo Enrico Paoli*, Florence 1956, 563-567.

The documents

The eighteen documents in the collection include three *vadimonia*[3] and seven *testimonia*. The eight remaining tablets contain only the names of witness, so that the character of the <153> documents to which they once belonged can only be guessed.[4] None of the documents have a date except two of the *vadimonia*: TH 14 records that it was executed on 7 September AD 74, and TH 15, on 12 March AD 75.[5] The date of TH 13 is not well preserved, but because it seems to resemble TH 14 very closely, it has been restored so as to be identical to TH 14. The place of execution is not preserved on any of the tablets in the lawsuit. The subject matter of the lawsuit, to the extent it can be discovered at all, is evident in the *testimonia*. Each of the *testimonia* is a statement about Iusta's status, with five giving facts in favour[6] of Iusta's *ingenuitas* and two against.[7]

The lawsuit

Iusta was the illegitimate daughter of Petronia Vitalis, a slave in the household of Calatoria Themis and her husband Petronius Stephanus. Vitalis had been manumitted at some time in the past; whether the manumission was formal or informal is not known. Iusta appears to have lived with Themis and Stephanus for a period of time after her mother's manumission, but was taken back by Vitalis after payment of expenses for Iusta's upkeep. At the time of the

[3] TH 13 (AD 74) : PUGLIESE CARRATELLI (1948), 168s. (= *AE* 1951, no. 215). TH 14 (AD 74) : ARANGIO-RUIZ (1959), 226-228 (= BOVE, ed., 1974, 555s.); PUGLIESE CARRATELLI (1948), 169s.. TH 15 (AD 75) : ARANGIO-RUIZ (1959), 228s. (= BOVE, ed., 1974, 556s.); PUGLIESE CARRATELLI (1948), 170s. <153>

[4] TH 21, 22, 25-30 (no dates): PUGLIESE CARRATELLI (1948), 176s., 181-183. Arangio-Ruiz has sugggested that TH 29 might be a document serving as evidence of Iusta's mother's manumission. ARANGIO-RUIZ (1959), 242.

[5] Some writers give 75 for 74, and 76 for 75. But Dušanič seems to have settled the matter, on the basis of evidence not available to earlier editors. See S. DUŠANIČ, *On the consules suffecti of A.D. 74-76*, *Epigraphica* 30 (1968), 59-74. Cf. A. DEGRASSI, *I fasti consolari dell' impero romano*, Rome 1952, 22.

[6] TH 16 (no date) : ARANGIO-RUIZ (1959), 234s. ; PUGLIESE CARRATELLI (1948), 171-173. TH 17 (no date) : ARANGIO-RUIZ (1959), 237-239 ; PUGLIESE CARRATELLI (1948), 173. TH 18 (no date) : PUGLIESE CARRATELLI (1948), 173s. TH 19 (no date) : PUGLIESE CARRATELLI (1948), 174s. TH 20 (no date) : ARANGIO-RUIZ (1959), 236s. ; PUGLIESE CARRATELLI (1948), 175s.

[7] TH 23 (no date): ARANGIO-RUIZ (1959), 239s. ; PUGLIESE CARRATELLI (1948), 177-179. TH 24 (no date): ARANGIO-RUIZ (1959), 241; PUGLIESE CARRATELLI (1948), 179s.

lawsuit it is likely that both Vitalis and Stephanus had died.[8] The lawsuit was between Iusta (perhaps the plaintiff[9]) and Themis, the only disputed fact being the time of Iusta's birth. The *testimonia* in the archive which favour Iusta's *ingenuitas* declare facts tending to show that Iusta was born after her mother's <154> manumission. The other *testimonia* in the archive purport to show the opposite, that Iusta was born before her mother's manumission. Why Iusta was seeking to prove her *ingenuitas* is not clear. It may have had something to do with Themis' rights as patron over Iusta's property[10], or Iusta's desire to marry a Roman citizen (assuming she were trying to remove the cloud of informal manumission).[11] In any event, it is likely that the controversy preserved in these documents was only the prelude to another controversy.[12] A magistrate in Herculaneum lacked the competence to hear the suit, and it therefore had to be transferred to Rome.[13]

It is not a simple matter to determine what course this lawsuit took, but there are three striking facts. First, a man named C. Petronius Telesphorus appears as the tutor to Themis in two of the *vadimonia*, TH 13 and 14, where he gives his authority to her promise to pay. Yet he also provides a *testimonium* in favour of Iusta, Themis' opponent (TH 16). Second, TH 14 declares an appearance date, 3 December 74, which is *nefas*.[14] Third, in TH 15 (the last *vadimonium*), Themis is represented by a new person, M. Calatorius Speudon. Arangio-Ruiz, who was not aware that 3 December was *nefas*, concluded that at some time after TH 13 and 14 were made, Telesphorus changed his allegiance from Themis to Iusta, with the result that no one bothered to appear on 3 December. Then followed a gap of three months to 12 March, at which time Themis is represented by Speudon in the new *vadimonium*. <155>

[8] ARANGIO-RUIZ (1948), 130s. <154>

[9] Iusta appears as the stipulator in the *vadimonia*, and this is ordinarily where the plaintiff appears (because it is the defendant who usually must be persuaded to return to the magistrate). But it is not certain that she was the plaintiff. See Crook (above note 1), 48s. In some cases both parties may wish to assure the other's appearance and will exchange mutual *vadimonia*. Crook believes that the Herculaneum *uadimonia* are of this kind. J. CROOK, *Working Notes on Some of the New Pompeii Tablets*, *ZPE* 29 (1978), 229.

[10] RAWSON (above note 1), 172s.

[11] GARDNER (above note 1), 224s.

[12] That is, the documents were prepared for a *praeiudicium an ingenuus sit* or a *sponsio praeiudicalis*. See Arangio-Ruiz (1948), 142-145.

[13] ARANGIO-RUIZ (1948), 141s.

[14] Noted by A. PIGANIOL, *Observations sur le procès de Justa*, in *St. U.E. Paoli*, Florence 1956, 566. See *Fasti Amiternini*, *CIL* I^2, pt. 1, no. 15, p. 245. <155>

The *vadimonia*

Any chronology given for these documents will be very substantially determined by the character of the *vadimonia*. This is not because the *vadimonia* are the only documents with a date, but rather because they are understood to be examples of a special kind of *vadimonium* ('extra-judicial') which is executed before a lawsuit is begun. This necessarily forces one to treat these *vadimonia* as among the earliest documents in the collection, and then to accommodate the remaining documents in the lawsuit as best as one can. This has the consequence, for example, of forcing the conclusion that the *testimonia* were executed after the suit was begun. I have discussed more fully elsewhere[15] the reasons why the *vadimonia* have been interpreted as extra-judicial, but briefly the reasons are these.

(1) A *vadimonium* is a promise to appear, a promise which might or might not be accompanied by a promise to pay in the event of non-appearance.[16] The textbooks typically distinguish between a 'judicial *vadimonium'* and an 'extra-judicial *vadimonium*'.[17] On the first of these we are quite well informed: in a given case, the parties when still before the magistrate might not be able to complete their business. Either party (but particularly the defendant) might require an inducement to return on another day. The magistrate would therefore order one or both parties to execute a promise to appear before him on another day. This is often described as a 'Vertagungs*vadimonium*'. If it happened that the case needed to be heard by another magistrate at a remote tribunal, the transaction was in substance the same, with the remote tribunal substituted for the local tribunal. This is often described as a 'Verweisungs*vadimonium*'.

(2) According to the prevailing view, an extra-judicial *vadimonium* was a private act, something which an intending <156> plaintiff, before any appearance *in iure*, requested his opponent voluntarily to execute. The assumption is that it was in the parties' mutual interest to begin a case in such an orderly way, rather than resorting to *in ius vocatio*.[18] We are not well

[15] METZGER (2000), 160-165.

[16] Gaius, *Institutes* 4.184-187

[17] KASER-HACKL (1996) § 31; W.W. BUCKLAND/STEIN, *A Textbook of Roman Law*[3], Cambridge 1963, 631. <156>

[18] See G. PUGLIESE, *Il processo civile romano* II, Milan 1963, 401; A. FLINIAUX, *Le Vadimonium*, Paris 1908, 105. Under the current view, however, the *in ius vocatio* was not replaced by the *vadimonium*, but worked in tandem with it. See KASER-HACKL (1996) § 31 II and especially J.G. WOLF, *Das sogenannte Ladungsvadimonium*, in J.A. ANKUM, J.E. SPRUIT, F.B.J. WUBBE (edd.), *Satura Roberto Feenstra*, Freiburg (Schweiz) 1985, 59-69.

informed about the extra-judicial *vadimonium*. This is principally because no ancient source describes or refers directly to a *vadimonium* of this type;[19] rather, we have various examples of *vadimonia* which by inference may be classed as extra-judicial.

(3) The Herculaneum *vadimonia* were not the first documentary *vadimonia* to be discovered[20], but they were indeed the first to be enough preserved to give a reasonable chance of interpretation. The following is a portion of the scriptura interior to TH 15 by way of example:

> Vadimonium factum M. Calatorio Speudonti in IIII Idus Martias primas Romae in foro Augusto ante aede Martis Ultoris hora tertia.
>
> HS M dari stipulata est ea quae se Petroniam Spurii filiam Iustam esse dicat spopondit M. Calatorius Speudon.

Arangio-Ruiz was among the first editors of these documents. He concluded that the three *vadimonia* in the Iusta lawsuit must be extra-judicial and not judicial. He argued that on their face they appeared to be private acts, because they did not include the decree of a magistrate.[21]. He also argued, as a complement to this argument, that the opening words of each document (‘*Vadimonium factum’*) were evidence of a unilateral injunction, <157> by the plaintiff to the defendant, to make a promise to appear.[22] The second of these arguments was in general not well received, but it did provoke many similar arguments which, like the rejected argument, assumed that the plaintiff to some degree took the initiative in making the *vadimonium*.[23]

[19] The earliest treatments of the extra-judicial *vadimonium* relied on the rubric to D.2.6 (‘*In ius uocati ut eant aut satis uel cautum dent*’), but this text has long been recognised as interpolated. See METZGER (2000), 138-143.

[20] See *CIL*[4] suppl. (1898), no. 3340, tab. 33.

[21] ARANGIO-RUIZ (1948), 136. He relied on a portion of the *lex de Gallia Cisalpina* which made reference to a *uadimonium* to Rome *ex decreto*: *Quo minus in eum, quei ita uadimonium Romam* ex decreto *eius, quei ibei i*(*ure*) *d*(*eicundo*) *p*(*raerit*)*, non promeisserit aut uindicem locupletem ita non dederit, ob e*(*am*) *r*(*em*) *iudicium recup*(*eratorium*) *is, quei ibei i*(*ure*) *d*(*eicundo*) *p*(*raerit*)*, ex h*(*ac*) *l*(*ege*) *det iudicareique d*(*e*) *e*(*a*) r(*e*) *ibei curet, ex h*(*ac*) l(*ege*) *n*(*ihilum*) *r*(*ogatur*). (RS I, no. 28: col. 2, ll. 21-4.) <157>

[22] ARANGIO-RUIZ (1948), 137-40.

[23] A.-J. BOYÉ, *Pro Petronia Iusta*, in *Mélanges Lévy-Bruhl*, Paris 1959, 36s. ; L. BOVE, *Documenti processuali dalle tabulae pompeianae de Murécine*, Naples 1979, 34s. ; T. GIMÉNEZ-CANDELA, *A propósito del “vadimonium” en las “tabulae pompeianae” de Murècine*, in *Studi Sanfilippo* I (1982), 186; I. BUTI, *Il “praetor” e le formalità introduttive del processo formulare*, Camerino 1984, 315-322.

Decree?

The idea that the three *vadimonia* in the Iusta lawsuit are extra-judicial is therefore based on two kinds of argument. First, we have the negative argument (by Arangio-Ruiz) that the *vadimonia* lack the decree of a magistrate. Second, we have various positive arguments (by Arangio-Ruiz and others) that the words *vadimonium factum* express or imply the initiative of the plaintiff. The second of these arguments do not require treatment here: I have pointed out elsewhere that no one has identified anything peculiarly extra-judicial in the words *vadimonium factum alicui*[24], and in any event this argument has been superseded.[25] But the first argument requires an answer.

The decree one might look for in a judicial *vadimonium* depends on the decree (if any) one expects to find. If one imagines that a magistrate ordered the parties to make a *vadimonium* in exactly the form our juristic sources describe, then one will find no decree among the Herculaneum *vadimonia*. The problem with this sort of reasoning is that no one knows exactly how these postponements were carried out, and therefore no one knows for certain what the decree (if any) should look like. So anyone who searches the documents for a specific kind of decree may not find it. What is the alternative? The alternative is to examine the documents and consider whether *ex hypothesi* a given type of proceeding might have produced the kind of documents we have. <158> Reasoning in this way cannot prove that such a type of proceeding took place or did in fact produce the documents, but it can prove that such a proceeding *might* have done so. In this respect it has an advantage over a search for a certain kind of decree — accepted *a priori* to be the proper one — which carries a high risk of excluding the right answer at the outset.

Most efforts to understand the *vadimonium* tablets to date have been analytical: the assumption is that, by collecting examples of *vadimonium facere* from various sources and examining them, one can better understand what event is recorded in the tablets with the words ‘vadimonium factum’. These efforts have certainly been fruitful, but they cannot explain one nagging fact: that the documents do not say what they ought to say. A number of juristic sources tell us fairly precisely what form of words a *vadimonium* assumed, the answer being exactly what we expect: a stipulation with two parts, first, that a person should appear, and second, that if the person does not

[24] METZGER (2000), 164s. <158>
[25] WOLF (above note 18), 68.

appear the promisor will pay.[26] Manthe rightly points out that our *vadimonium* tablets do not contain this sort of 'double stipulation' and therefore cannot be reconciled with the juristic sources.[27] And the problem is even deeper than this: it is hard to explain the sheer clumsiness with which these documents try to express their meaning. The problem with the first sentence is a comparatively minor problem of 'self-predication': by stating that a *vadimonium* was made for a day, place, and time, but not for a penalty in the event of non-appearance, the documents are suggesting wrongly that the entire *vadimonium* is somehow concluded when the transaction is only partly executed. The problem with the second sentence is more obvious: it ought to consist of a conditional promise to pay, but instead consists of an <159> *un*conditional promise to pay. Treating these problems as problems of language can help to only a limited degree: Wolf's analysis is the most convincing to date, but even if we accept that *vadimonium factum* expresses a defendant's promise to furnish a further promise, we are still left to explain why the tablets choose to record such a straightforward contract in a way which a lawyer would regard as clumsy, not to mention wrong.

A good starting point for addressing this problem is to recall what sort of documents these are. A *vadimonium* uses the form of a *verborum obligatio*, and as such the promisor becomes bound to appear, and to pay if he does not, when the proper form of words is concluded. The documents which record the *vadimonium* are not, of course, 'constitutive' of the obligation, but merely 'declaratory'.[28] In other words, they serve many useful purposes but do not themselves create an obligation. They serve these purposes, among others:

— They serve as memoranda of the promised appearance.
— They serve as evidence of the time and place of the promised appearance.
— They serve as a evidence of the amount a defendant owes in case he does not appear.

[26] See D.45.1.126.3 (Paul 3 *quaest*.) ; D.45.1.115pr (Papinian 2 *quaest*.) ; D.45.1.81pr (Celsus in Ulpian 77 *ed*.) ; D.2.11.14 (Neratius 2 *membr*.) ; D.2.5.3 (Ulpian 47 *Sab*.); D.45.1.97pr (Celsus 26 *dig*). Assuming the person to appear was also the promisor, the stipulation would usually take the form '*te sisti et si non steteris poenam dari*'.

[27] U. MANTHE, *Gnomon* 53 (1981) 157s. (reviewing BOVE, *Documenti processuali dalle Tabluae Pompeianae*). MANTHE'S comments are directed at both the Herculaneum tablets and the (in substance identical) tablets from Puteoli. Manthe believes the contradiction can be resolved only by concluding either that the juristic sources reflect a change in the law from the time of the tablets, or that the juristic sources have been altered. <159>

[28] M. KASER, *Das römische Privatrecht* I[2], Munich 1971, 231; GARDNER (above note 2), 12.

— They provide a list of witnesses who may be called to give evidence about the promised appearance.[29]
— If they record a judicial *vadimonium*, they serve as evidence that the parties have performed what they were ordered to perform.

For purposes of the present discussion, the last of these is the most important. The praetor or local magistrate, when appropriate, ordered the parties to execute a *vadimonium*[30], and they were obliged to do so. The sanction for a failure to obey the order is not certain; the only hard evidence is the *lex de Gallia Cisalpina* (ca. 42 BC), which allows the local magistrate to appoint *recuperatores* and grant a trial against anyone who refuses to promise a <160> *vadimonium* or produce an adequate *vindex*.[31] What remedy existed at Rome is unknown: it seems unlikely the praetor denied himself a power which a local magistrate possessed[32], and Lenel suggests that a refusing party in Rome might have faced, not a trial by *recuperatores*, but *missio* (on the argument that a magistrate in Cisalpine Gaul may have been given one power in substitution for another—*missio*—that as a local magistrate he could not possess).[33] But whatever the sanction, a party would be eager to avoid it, and would find it useful to have evidence that he had done what he was ordered to do.

How well would our *vadimonium* tablets serve this purpose? The answer depends on exactly what a magistrate ordered to be done, and how well that order might be reflected in the tablet's language. The best guidance we have on the praetor's order is Gaius, who says that when a person was *in ius vocatus* but business *in iure* could not be finished on the day, 'vadimonium ei faciendum est, id est ut promittat se certo die sisti.'[34] No one doubts that the

[29] The Herculaneum *vadimonia* are incomplete in this respect: TH 15 does contain a list of witnesses, but TH 13 and 14 are missing the fourth page where, on the example of TH 15, the list of witnesses would have appeared.

[30] Probus 6.63 (Einsiedeln 326): *V.F.I. uadimonium fieri iubere*. <160>

[31] RS I, no. 28: col. 2, ll. 21-4.

[32] FLINIAUX (note 18), 47s. ; Y. BONGERT, *Recherches sur les Récupérateurs*, *Varia. Études de droit Romain* [Publications de l'Institut de Droit Romain de l'Université de Paris, vol. 9] Paris 1952, 169.

[33] LENEL, *EP*[3], pp. 80s., n.11. For a recent discussion of a related issue — whether a failure to appear could be treated under the same edict as a failure to make the promise — see D. JOHNSTON, 'Vadimonium, the lex Irnitana, and the edictal commentaries', in U. MANTHE AND C. KRAMPE (edd.), *Quaestiones Iuris. Festschrift für J.G. Wolf*, Berlin 2001, 119s.

[34] Gaius, *Institutes* 4.184. See also Probus 6.63 (quoted above note 30); Valerius Maximus, *Facta et Dicta Memorabilia* 3.7.1b ('*vadimonium ... facere iussit*') ; Livy 23.32 ('*vadimonia fieri iusserunt*'). The latter two authors may be using the terminology of their

Gaius passage is alluding to the magistrate's order, and no one doubts even that the order is reflected indirectly in the words of the *vadimonium* tablets. But only indirectly: the tablets (as most understand them) record private acts, private acts which happen to be modelled on their judicial counterparts, and which therefore resemble the magistrate's order in certain respects.[35] The difficulty is that in certain other respects the words of the tablets do not seem to match what Gaius is describing, and this would <161> foreclose the idea that the tablets record judicial *vadimonia*. We presume from reading Gaius that the magistrate ordered the parties to execute the 'double stipulation' of the kind we find in the juristic sources. But as discussed above, the tablets do not record a double stipulation, instead recording a statement that a *vadimonium* was made for a day, place, and time, with a stipulation and promise added at the end.

The explanation is perhaps that the magistrate's order did not extend as far as we have assumed. It is possible that the magistrate ordered the parties to execute a *vadimonium* for appearance at a certain day, place, and time, but did not concern himself with the amount of the penalty in the event of non-appearance. On this explanation the actual stipulation and promise would take the form which the juristic sources suggest they should take, but the record of the stipulation and promise would be fragmented. The record would state (for the reasons given above) that the parties had done what the magistrate ordered them to do ('Vadimonium factum Numerio Negidio in diem locum horam'), but the penalty would not be a part of this statement.

Gaius describes the permissible limits of the penalty at *Institutes* 4.186: in most cases the penalty could not exceed one-half the value of the *res*, and in any event not more than 100,000 sesterces. Lenel puts these rules in the second clause of the seventh title of the edict.[36] The rules do not state what the amount of the penalty must be, but rather what the amount of the penalty cannot be. As a practical matter the precise amount in a given case could be a matter of negotiation between the parties. If the plaintiff demands a sum beyond the permissible limits he runs the risk, in consequence of the edict, of coming away with nothing in the event the defendant does not appear. And if the defendant refuses to agree to any sum at all, he may face a claim for the entire value of the suit in the <162> event he does not appear.[37] In fact this

own time.

[35] The tablets, on this view, resemble the magistrate's order in two respects: first, in using the words '*vadimonium factum*', and second, in reciting a place of appearance not at, but near, the magistrate's tribunal. <161>

[36] LENEL *EP*[3] § 18. <162>

[37] D.2.5.3 (Ulpian, 47 *Sab.*): *Cum quis in iudicio sisti [sc. uadimonium] promiserit neque*

latter rule suggests that, at the very least, it was not a matter of routine for the magistrate to set the penalty; a defendant who failed to do what the magistrate ordered would almost certainly face (as discussed above) something more severe than a claim from his opponent for *quanti ea res erit*.[38]

In short, if the Herculaneum *vadimonia* are recording the stipulation and promise in the way suggested, then it is not hard to understand why the magistrate's order is recorded separately from the amount of the penalty. And on this explanation these *vadimonia* should not be classified as private, extra-judicial *vadimonia* on the argument that they 'lack a decree'. If the language of the tablets does indeed reflect the circumstances of its creation in the way I have suggested, then the tablets do not record extra-judicial *vadimonia*. These tablets therefore should not occupy the earlier places in the chronology of documents.

Assembling a chronology

The three *vadimonia* in the Iusta lawsuit may indeed be judicial *vadimonia*, but this fact does not necessarily tell us where in the lawsuit they fall. The following conclusions, however, are relatively secure:

(1) TH 13 and 14 predate TH 15, because they carry an execution date that is earlier than TH 15.
(2) TH 13 and 14 are Verweisungs*vadimonium*, that is, they were executed in Herculaneum, on the order of the local magistrate, for appearance before the urban praetor in Rome. <163>
(3) TH 15 is a Vertagungs*vadimonium*, that is, it was executed in Rome for an appearance one year later in Rome.[39]

adiecerit poenam, si status non esset: incerti cum eo agendum esse in id quod interest uerissimum est, et ita Celsus quoque scribit. See also D.45.1.81pr.-1 (Ulpian, 77 ed.).

[38] I do not argue here that the magistrate *never* set the amount of the penalty for non-appearance. A well-known text in Gaius (*Institutes* 3.224) tells us that the praetor did set the amount of the penalty in the case of *atrox iniuria*. But the very point of the passage is to show that the praetor had an opportunity in the case of *atrox iniuria* which he did not have in the case of oridinary *iniuria*: the opporunity to set the penalty for non-appearance (and thereby impliedly to set an upper limit for the amount of damages). This simply underscores the point that in other cases (and it remains uncertain which ones) the praetor did not set the penalty for non-appearance. <163>

[39] On the place of execution, see ARANGIO-RUIZ (1959), 229 ; cf. F. COSTABILE, *Nuove luci sul "processo di Giusta"*, in *Studi in onore di C. Sanfilippo* VII, Milan 1987, 224s. On the one-year gap between execution and appearance, see PIGANIOL (above note 14), 556;

We can supplement these relatively secure conclusions with some suggestions which are not so certain but are nevertheless likely.

editio instrumentorum

The idea that TH 13 and 14 are Verweisungs*vadimonia* and not extra-judicial *vadimonia* may change the character of some *testimonia*. The local magistrate lacks competence to consider the matter of Iusta's *ingenuitas* and has therefore ordered the matter to be heard in Rome. But he is unlikely to take such a step without at least some evidence, particularly because the plaintiff in this case—perhaps Iusta—was probably required to make a 'showing of evidence' (*editio instrumentorum*) before she could proceed any further. Ulpian, writing on the edict, is the principal source for this rule; he states that a claimant was required to make known to his adversary all evidence on which he intended to rely at the trial.[40] Bürge has suggested that the *testimonia* in this lawsuit may indeed belong to evidence which was disclosed at the beginning of the lawsuit in fulfilment of this requirement. He has done so for reasons different from those offered here, but his conclusion is the same.[41] The result is that any chronology must acknowledge the possibility that all of the *testimonia* (with one exception) may predate TH 13 and 14.

The one exception is TH 16, the *testimonium* of Telesphorus. Because this statement is against the interests of Themis, and because Telephorus appears as Themis' tutor in TH 13 and 14, it does not seem possible for such a statement to predate these two *vadimonia*. <164>

Arangio-Ruiz, as mentioned above, has suggested that TH 29—which contains only the names of *signatores*—might be evidence of the manumission of Iusta's mother Vitalis. He did so on the basis of the unusual number of names, the likelihood that the document was drafted in Herculaneum, the appearance of 'Vitalis' on the tablet's 'index', and the appearance of Petronius Stephanus among the *signatores*.[42] If he is correct, then this tablet also should be treated as a document which may have been produced before TH 13 and 14 were prepared.

ARANGIO-RUIZ (1959), 229s. ; COSTABILE, op. cit., 225.

[40] D.2.13.1.3 (Ulpian, 4 *ed*.). See generally KASER-HACKL (1996) § 30 I.

[41] A. BÜRGE, *Zum Edict De edendo*, *ZSS* (rom. Abt.) 112 (1995), 29-31. Bürge relies in particular on the character of the language in the *testimonia*. <164>

[42] ARANGIO-RUIZ (1959), 242s.

TH 13 and 14: same or *different?*

TH 13, as mentioned above, has been restored so as to be identical to TH 14 (except as to certain abbreviations). There would be no reason to cast any doubt on these emendations to TH 13, except for three facts; first, the fact that TH 14 sets an appearance date which is *nefas*, something that was unknown to the editors, second, the fact that the appearance date in TH 13 is lost entirely, and third, the fact that the execution date is only partly preserved.[43] Taking these three facts together suggests the possibility (and it is only a possibility) that TH 13 records a *vadimonium* that was made after the error in TH 14 was discovered, and records an appearance date on which a magistrate was permitted to administer justice.

The question is of some importance to any interpretation of this lawsuit, because one of the principal outstanding questions is whether we possess all or only some of the documents in the case. If, as I have suggested above, the *vadimonia* in this case are judicial *vadimonia*, and if a gap remains between the appearance date of one *vadimonium* and the execution date of the next, then we may indeed be missing at least one *vadimonium*, and on that possibility, other documents as well. I suggest this as a tentative conclusion: if we do indeed possess all of the documents in the case, then TH 13 may have been executed after TH 14, and may have recorded an <165> appearance date of 12 March 75, which is the execution date of TH 15.[44]

TH 16: testimonium *of Telesphorus*

Here it is important only to repeat the suggestion of Arangio-Ruiz, that the *testimonium* of Telesphorus in favour of Iusta may indeed have provoked Themis into replacing Telesphorus with Speudon, who appears for Themis (probably as procurator) in Rome on 12 March 75.[45]

[43] I have not seen TH 13 and I am making this observation on the basis of the text at PUGLIESE CARRATELLI (1948), 168. <165>

[44] Piganiol is clearly bothered by the possibility that TH 15 might have been executed in Rome, as Arangio-Ruiz argued. PIGANIOL (above note 14), 566. The problem, of course, is that if TH 14 was of no effect, it is not easy to explain how the matter got to Rome from Herculaneum, and this is a problem whether one regards the *vadimonia* as judicial or extra-judicial. It seems to me that reading TH 13 as a new Verweisungs*uadimonium* to Rome would cure this problem.

[45] V. ARANGIO-RUIZ, *Nuove osservazioni sul processo di Giusta*, *Par. Pass*. 6 (1951), 122.

Suggested chronology

On the basis of the discussion above I suggest the following chronology:

1. TH 29: manumission (?) of Vitalis.
2. Any or all of: TH 17, 18, 19, 20: *testimonia* on Iusta's behalf. TH 23, TH 24: *testimonia* against Iusta.
3. TH 14 (7 September 74): *vadimonium* for a day which is *nefas*.
4. TH 13 (7? September 74): a 'corrected' *vadimonium*.
5. TH 16: *testimonium* by Telesphorus.
6. TH 15 (12 March 75): *vadimonium* against Speudon.